STEPHEN WONG LEONG KIONG A

v.

HSBC BANK MALAYSIA BHD

COURT OF APPEAL, PUTRAJAYA B
DENIS ONG JCA
HASHIM YUSOFF JCA
ZALEHA ZAHARI JCA
[CIVIL APPEAL NO: N-03-49-2005]
18 MAY 2009 C

BANKRUPTCY: *Petition - Validity of creditor's petition - Whether a formal defect would invalidate bankruptcy proceedings - Misstatement of date of act of bankruptcy - Bankruptcy Act 1967, s. 6(3)*

This was an appeal by the judgment debtor against the decision of the High Court affirming the registrar's decision dismissing the judgment's debtor's application to dismiss the creditor's petition pursuant to s. 6(3) of the Bankruptcy Act 1967 ('Act'). The only issue requiring consideration was whether a formal defect, in this case a misstatement of the date of the act of bankruptcy, would invalidate the bankruptcy proceedings. D E

Held (allowing the appeal)
Per Hashim Yusoff JCA delivering the judgment of the court: F

(1) The High Court should have followed what was stated by the Court of Appeal of Brunei in the case of *Abdul Hamid & Anor v. Polynesia Offshore Supplies (M) Bhd* and given effect to s. 6(3) of the Act. On the facts of the instant appeal, the High Court judge, having found that the date of the act of bankruptcy was wrong, should have allowed the judgment debtor's appeal and dismissed the petition. *Abdul Hamid & Anor v. Polynesia Offshore Supplies (M) Bhd* (foll). G

Bahasa Malaysia *Translation Of Headnotes* H

Ini adalah rayuan oleh penghutang penghakiman terhadap keputusan Mahkamah Tinggi mengesahkan keputusan pendaftar menolak permohonan penghutang penghakiman untuk menolak petisyen pemiutang mengikuti s. 6(3) Akta Kebankrapan 1967 ('Akta'). Isu tunggal yang perlu dipertimbangkan ialah sama ada suatu kecacatan formal, dalam kes ini sesuatu pernyataan silap tarikh perbuatan kebankrapan, akan mentaksahkan prosiding kebankrapan. I

Diputuskan (membenarkan rayuan)
Oleh Hashim Yusoff HMR menyampaikan penghakiman mahkamah:

(1) Mahkamah Tinggi sepatutnya mengikut apa yang dinyatakan oleh Mahkamah Rayuan Brunei dalam kes *Abdul Hamid & Anor v. Polynesia Offshore Supplies (M) Bhd* dan memberi efek kepada s. 6(3) Akta. Atas fakta-fakta rayuan semasa, hakim Mahkamah Tinggi, setelah mendapati bahawa tarikh perbuatan kebankrapan adalah salah, sepatutnya membenarkan rayuan penghutang penghakiman dan menolak petisyen itu. *Abdul Hamid & Anor v. Polynesia Offshore Supplies (M) Bhd* (diikuti). (paras 11 & 12)

Case(s) referred to:
Abdul Hamid & Anor v. Polynesia Offshore Supplies (M) Bhd [1990] 3 MLJ 94 ***(foll)***
Pg Ahmad Pg Hj Abdullah; Re: Ex parte: Oriental Bank Bhd [1991] 3 CLJ 2899; [1991] 3 CLJ (Rep) 463 HC ***(refd)***
Re Arif Sionggong; ex parte Arab Malaysian Finance Berhad [1995] 4 BLJ 359 HC ***(refd)***
Re Fadzil Othman; ex p Malayan Banking Bhd [1994] 2 MLJ 474 ***(refd)***
Re Liow Fong Mooi; ex parte Malayan Banking Bhd [2000] 6 CLJ 63 HC ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 6(3), 93(3), 131

For the appellant/judgment debtor - LH Chua; M/s LH Chua
For the respondent/judgment creditor - Norazam Mohd Daud; M/s Stanley Ponniah, Ng & Soo

[Appeal from High Court, Seremban; Bankruptcy Matter No: 29-155-2001]

[Editor's note: For the High Court judgment, please see Re Stephen Wong Leong Kiong; Ex P HSBC Bank Malaysia Bhd [2005] 5 CLJ 504.]

Reported by Suresh Nathan

JUDGMENT

Hashim Yusoff JCA:

[1] This is an appeal by the judgment debtor ("the JD") against the decision of the High Court at Seremban which had affirmed the court registrar's decision dated 8 November 2002, in

dismissing with costs the JD's application by summons in chambers (encl. 8) to dismiss the creditor's petition (the "CP") pursuant to s. 6(3) of the Bankruptcy Act 1967 ("the Act"). The appeal was unanimously allowed with costs. We now give our reasons.

[2] The crux of this appeal is whether a formal defect would invalidate the bankruptcy proceedings?

[3] At the hearing of this appeal we requested learned counsel for the respondent to submit first.

[4] Learned counsel for the respondent refer to s. 131 of the Act which provides:

> **131. Formal defect not to invalidate proceedings**
>
> No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of the court.

[5] He then cited two High Court authorities ie, *Re Arif b. Sionggong; ex parte Arab Malaysian Finance Berhad* [1995] 4 BLJ 359 and *Re Liow Fong Mooi; ex parte Malayan Banking Bhd.* [2000] 6 CLJ 63; where Tee Ah Sing JC (as he then was) in the former case and Clement Skinner JC (as he then was) in the latter held that an error in stating the date in which the act of bankruptcy took place was an irregularity only which was remediable under s. 131 of the Act as no substantial injustice has been caused by it.

[6] Further, it was argued that s. 93(3) of the Act enables the court at any time to amend any written process or proceeding upon such terms, if any, as it thinks fit to impose.

[7] However, learned counsel for the appellant argued that in *Re Liow*'s case *supra*, there was a formal application made by the judgment creditor ("JC") to amend the date of the act of bankruptcy as opposed to the case in the instant appeal where there was none made by the JC. But it was on the learned High Court judge's own volition that he amended the date. It was submitted before us that the learned High Court Judge should not have done so.

[8] Before the High Court, learned counsel for the JD had argued that the CP was defective and of no legal effect as the date of bankruptcy should have been 7 June 2001 and not 2 June 2001 as stated in the CP. The learned High Court Judge in reckoning what was the correct date of the act of bankruptcy found it to be 7 June 2001 and not 2 June 2001 as stated in para 4 of the CP (see p. 27 of the appeal record).

[9] However, the learned High Court Judge subscribed to the concurrent views of Tee Ah Sing JC (as he then was) and Clement Skinner JC (as he then was) and disagreed with the decision of Richard Talalla J (as he then was) who held that the effect of the misstatement of the date of the act of bankruptcy was fatal (see *Re Fadzil bin Othman; ex p Malayan Banking Bhd.* [1994] 2 MLJ 474).

[10] Although the learned High Court Judge in the instant appeal was mindful of the statement of the Court of Appeal of Brunei in *Abdul Hamid & Anor v. Polynesia Offshore Supplies (M) Bhd* [1990] 3 MLJ 94, which was followed by Syed Ahmad Idid J (as he then was) in *Pg. Ahmad bin Pg. Haji Abdullah; Re: Ex parte: Oriental Bank Bhd.* [1991] 3 CLJ 2899; [1991] 3 CLJ (Rep) 463, that bankruptcy proceedings are of a quasi-penal nature, and so it is imperative that procedural requirements are strictly complied with, yet his Lordship found there was no substantial injustice caused by the mere misstatement of the date of the act of bankruptcy. We however agree with the view expressed by the Brunei Court of Appeal in the matter.

Conclusion

[11] With utmost respect to the learned High Court Judge, we think that the High Court should have followed what was stated by the Court of Appeal in *Abdul Hamid*'s case, *supra*, and give effect to s. 6(3) of the Act which provides:

> 6(3) If the court is not satisfied with the proof of the petitioning creditor's debt or of the act of bankruptcy or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the court may dismiss the petition.

[12] On the facts of the instant appeal the learned judge had found that the date of the act of bankruptcy was wrong, then his Lordship should have allowed the JD's appeal and dismissed the petition.

[13] For the above reasons, we allowed this appeal with costs and ordered the deposit to be refunded to the appellant. The order of the High Court is set aside.